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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

Federal Trade Commission,
Plaintiff,

v.

MaxTheater, Inc., a Washington
corporation, and
Thomas L. Delanoy, individually and
as an officer of MaxTheater, Inc.,
Defendants.

No. 05-CV-0069-LRS
Stipulated Final Order for
Permanent Injunction and
Other Equitable Relief

1 Plaintiff, the Federal Trade Commission ("FTC" or the "Commission"),
2 filed its complaint for injunctive and other equitable relief in this matter pursuant
3 to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.
4 § 53(b), and moved ex parte for a temporary restraining order and for an order to
5 show cause why a preliminary injunction should not be granted pursuant to Rule
6 65(b) of the Federal Rules of Civil Procedure. The Court granted the FTC's
7 motion and entered a Temporary Restraining Order ("TRO") and Order to Show
8 Cause against defendants Thomas L. Delanoy and MaxTheater, Inc. on March 8,
9 2005. The Commission and the defendants, by and through their counsel,
10 stipulated to the entry of a Stipulated Preliminary Injunction, which was entered
11 by the Court on March 31, 2005. The Commission and the defendants, by and
12 through their counsel, hereby stipulate to the entry of and request the Court to
13 enter this Stipulated Final Order for Permanent Injunction and Other Equitable
14 Relief ("Order"), to resolve all matters of dispute between them in this action. **IT**
15 **IS THEREFORE STIPULATED, AGREED, AND ORDERED** as follows:

- 21 1. This Court has jurisdiction over the subject matter of this case,
22 and there is good cause to believe that it will have jurisdiction over
23 all parties hereto;
24

1 2. The facts that the FTC has stated in its complaint, if true, would
2 state a claim upon which relief may be granted under Sections 5(a)
3 and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b);
4

5 3. The defendants have entered into this Order freely and without
6 coercion, and the defendants acknowledge that they have read the
7 provisions of this Order and are prepared to abide by them;
8

9 4. The plaintiff and the defendants, by and through their counsel,
10 have agreed that the entry of this Order resolves all matters of dispute
11 between them arising from the Complaint in this action, up to the date
12 of entry of this Order. This Order, however, shall have no preclusive
13 effect as to any action brought by any other state or federal law
14 enforcement agency;
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17 5. By stipulating to this Order, defendants do not admit liability in
18 this matter;
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20 6. The defendants waive all rights to seek appellate review or
21 otherwise challenge or contest the validity of this Order. The
22 defendants further waive and release any claim they may have against
23 the Commission, its employees, representatives, or agents;
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1 7. The defendants agree that this Order does not entitle the
2 defendants to seek or to obtain attorneys' fees as a prevailing party
3 under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended
4 by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and the defendants
5 further waive any rights to attorneys' fees that may arise under said
6 provision of law; and
7

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9 8. Entry of this Order is in the public interest.
10

11
12 **DEFINITIONS**

13 For the purpose of this Order for Permanent Injunction and Other Equitable
14 Relief ("Order"), the following definitions shall apply:
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16 A. "Affiliate marketer" or "sub-affiliate marketer" means any
17 person who provides or has provided the defendants with, or
18 who refers or has referred to the defendants, actual or potential
19 customers, whether pursuant to the defendants' "Affiliate
20 Program" or otherwise.
21

22 B. "Defendants" means MaxTheater, Inc. and Thomas L. Delanoy
23 also doing business as "SpywareAssassin,"
24

25 "SpywareAssassin.com," "CCSecured" and "CCSecured.com,"
26

1 "DermCloth," "Profit Installer Pro," "Software Prowler,"
2 "2Templates," "NT Ventures," "Add Linking," "Rocket Bidz,"
3 "Discuss.cc," "Travel-intl.com," and their successors and
4 assigns.
5

6 C. "Document" is synonymous in meaning and equal in scope to
7 the usage of the term in Federal Rule of Civil Procedure 34(a),
8 and includes writing, drawings, graphs, charts, Internet sites,
9 Web pages, Web sites, electronic correspondence, including e-
10 mail and instant messages, photographs, audio and video
11 recordings, computer records, whether active or inactive, and
12 any other data complications from which information can be
13 obtained and translated, if necessary, through detection devices
14 into reasonably usable form. A draft or non-identical copy is a
15 separate document within the meaning of the term.
16

17 D. "Plaintiff" means Federal Trade Commission.
18

19 E. "Spyware," solely for purpose of this Order, has the meaning
20 ascribed to it by the defendants in their marketing media and
21 includes "adware" and other programs that "secretly install on
22 your computer without your permission or
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1 knowledge” and may cause “pop ups,” banner advertisements,
2 and other extraneous ads, send “spam” e-mail messages, hijack
3 search engine links or home pages, track online activity, allow
4 others to remotely access a computer, record private
5 information or steal passwords. It also includes “adware,
6 keyloggers, trojans, hijackers, dialers, viruses, spam, and
7 general ad serving.”
8

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10 F. “‘Anti-spyware’ product” means any product, however
11 denominated, including but not limited to “SpywareAssassin,”
12 that does or purports to identify, monitor, remove, block, or
13 otherwise prevent spyware from residing on a computer.
14
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16 17 CONDUCT PROHIBITIONS

18 19 I.

20 **IT IS THEREFORE ORDERED** that defendants, and those persons
21 in active concert or participation with them who receive actual notice of this Order
22 by personal service or otherwise, are hereby permanently restrained and enjoined
23 from engaging, participating, or assisting others in any capacity whatsoever, in the
24 advertising, promoting, marketing, offering, providing, selling or offering for sale
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1 of any "anti-spyware" product or service.
2
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4 **II.**

5 **IT IS FURTHER ORDERED** that defendants, and those persons in active
6 concert or participation with them who receive actual notice of this Order by
7 personal service or otherwise, are hereby permanently restrained and enjoined from
8 engaging, participating, or assisting others in any capacity whatsoever, in the
9 downloading or installing of spyware onto consumers' computers.
10
11

12 **III.**

13 **IT IS FURTHER ORDERED** that, in connection with advertising,
14 promoting, marketing, offering, providing, selling or offering for sale any product
15 or service, defendants, and those persons in active concert or participation with
16 them who receive actual notice of this Order by personal service or otherwise, are
17 hereby permanently restrained and enjoined from making, or assisting others in
18 making, directly or indirectly, expressly or by implication, any material false or
19 misleading representation.
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MONETARY JUDGMENT AND CONSUMER REDRESS

IV.

IT IS FURTHER ORDERED that:

A. Judgment is entered against defendants Thomas L. Delanoy and MaxTheater, Inc. in the amount of seventy-six thousand dollars (\$76,000) for consumer redress, which amount shall be transferred from the escrow account that was established pursuant to the stipulated Preliminary Injunction. This amount shall be paid to the Federal Trade Commission within five (5) days after the date of entry of this Order by wire transfer in accord with directions provided by the Commission no later than five (5) days after the date of entry of this Order.

B. All funds paid pursuant to the Order shall be deposited into an account administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the defendants' practices alleged in the complaint. Any funds

1 not used for such equitable relief shall be deposited to the United States Treasury.
2 as disgorgement. The defendants shall have no right to challenge the
3 Commission's choice of remedies under this Paragraph. The defendants shall have
4 no right to contest the manner of distribution chosen by the Commission.
5

6 C. The FTC and the defendants acknowledge and agree that no
7 portion of this judgment for equitable relief shall be deemed a fine, penalty,
8 punitive assessment or forfeiture.
9

10 D. The defendants relinquish all dominion, control and title to the
11 funds paid into the account established pursuant to this Order, and all legal and
12 equitable title to funds shall vest in the Treasurer of the United States unless and
13 until such funds are disbursed to consumers. The defendants shall make no claim
14 to or demand for the return of funds, directly or indirectly, through counsel or
15 otherwise; and in the event of bankruptcy of any defendant, the defendants
16 acknowledge that the funds are not part of the debtor's estate, nor does the estate
17 have any claim or interest therein.
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21 E. Proceedings instituted under this Paragraph are in addition to,
22 and not in lieu of, any other civil or criminal remedies that may be provided by law,
23 including any other proceedings that the Commission may initiate to enforce this
24 Order.
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COMPLIANCE MONITORING

V.

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order,

A. Within 10 (ten) days of receipt of written notice from a representative of the Commission, the defendants each shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

1. obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;
2. posing as consumers and suppliers to: defendants' employees, or any other entity managed or controlled in

1 whole or in part by defendants, without the necessity of
2 identification or prior notice; and
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5 C. Defendants shall permit representatives of the Commission to
6 interview any employer, consultant, independent contractor, representative, agent,
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8 or employee who has agreed to such an interview, relating in any way to any
9 conduct subject to this Order. The person interviewed may have counsel present.
10

11 *Provided, however,* that nothing in this Order shall limit the
12 Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of
13 the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible
14 things, testimony, or information relevant to unfair or deceptive acts or practices in
15 or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).
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18 **COMPLIANCE REPORTING BY DEFENDANT**
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20 **VI.**

21 **IT IS FURTHER ORDERED** that, in order that compliance with the
22 provisions of this Order may be monitored:
23

24 A. For a period of five (5) years, from the date of entry of this
25 Order,
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1 1. Individual defendant Thomas Delanoy shall notify the
2 Commission of the following:

- 3
- 4 a. Any changes in residence, mailing addresses, and
5 telephone numbers of the individual defendant,
6 within ten (10) days of the date of such change;
7
- 8 b. Any changes in employment status (including
9 self-employment) of the individual defendant, and
10 any change in the ownership of the individual
11 defendant in any business entity, within ten (10)
12 days of the date of such change. Such notice shall
13 include the name and address of each business that
14 the individual defendant is affiliated with,
15 employed by, creates or forms, or performs services
16 for; a statement of the nature of the business; and a
17 statement of the individual defendant's duties and
18 responsibilities in connection with the business or
19 employment; and
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- 21 c. Any changes in the individual defendant's name or
22 use of any aliases or fictitious names in conducting
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1 business; and

- 2 2. The defendants shall notify the Commission of any
3 changes in corporate structure of the corporate defendant
4 MaxTheater, Inc., or any business entity that the
5 individual defendant directly or indirectly controls, or has
6 an ownership interest in, that may affect compliance
7 obligations arising under this Order, including but not
8 limited to a dissolution, assignment, sale, merger, or other
9 action that would result in the emergence of a successor
10 entity; the creation or dissolution of a subsidiary, parent,
11 or affiliate that engages in any acts or practices subject to
12 this Order; the filing of a bankruptcy petition; or a change
13 in the corporate name or address, at least thirty (30) days
14 prior to such change, *provided* that, with respect to any
15 proposed change in the corporation about which any
16 defendant learns less than thirty (30) days prior to the
17 date such action is to take place, defendant(s) shall notify
18 the Commission as soon as is practicable after obtaining
19 such knowledge.
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1 B. One hundred eighty (180) days after the date of entry of
2 this Order, defendants each shall provide a written report to the FTC, sworn to
3 under penalty of perjury, setting forth in detail the manner and form in which they
4 have complied and are complying with this Order. This report shall include, but
5 not be limited to:
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7
8 1. For the individual defendant Thomas Delanoy:

- 9 a. The then-current residence address, mailing
10 addresses, and telephone numbers of the individual
11 defendant;
12
13 b. The then-current employment and business
14 addresses and telephone numbers of the individual
15 defendant, a description of the business activities
16 of each such employer or business, and the title and
17 responsibilities of the individual defendant for each
18 such employer or business; and
19
20 c. Any other changes required to be reported under
21 subparagraph A of this Section.
22

23
24 2. For all the defendants:

- 25 a. A copy of each acknowledgment of receipt of this
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Order obtained by the defendant pursuant to
Paragraph VIII of this Order; and

b. Any other changes required to be reported under
subparagraph A of this Section.

C. For the purposes of this Order, the defendants shall,
unless otherwise directed by the Commission's authorized representatives, mail all
written notifications to the Commission to:

Associate Director for the Division of Enforcement
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
Re: FTC v. MaxTheater, Inc. and Thomas Delanoy, (Civil
Action No. 05-CV-0069-LRS, E.D. Wash.)

D. For purposes of the compliance reporting and monitoring
required by this Order, the Commission is authorized to communicate directly with
the defendants, and likewise, defendants are not precluded from having legal
representation and counsel present regarding the same.

RECORD KEEPING PROVISIONS

VII.

IT IS FURTHER ORDERED that, for a period of eight (8) years from the

1 date of entry of this Order, the defendants, where they are directly or indirectly
2 engaged in the business of advertising, marketing, or selling goods or services via
3 the Internet, and their agents, employees, officers, corporations, successors, and
4 assigns, and those persons in active concert or participation with them who receive
5 actual notice of this Order by personal service or otherwise, are hereby restrained
6 and enjoined from failing to create and retain the following records:
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9 A. Accounting records that reflect the cost of goods or services
10 sold, revenues generated, and the disbursement of such revenues;
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12 B. Personnel records accurately reflecting: the name, address, and
13 telephone number of each person employed in any capacity by such business,
14 including as an independent contractor; that person's job title or position; the date
15 upon which the person commenced work; and the date and reason for the person's
16 termination, if applicable;
17

18 C. Customer files containing the names, addresses, phone numbers,
19 dollar amounts paid, quantity of items or services purchased, and description of
20 items or services purchased, to the extent such information is obtained in the
21 ordinary course of business;
22

23 D. Complaints and refund requests (whether received directly,
24 indirectly or through any third party) and any responses to those complaints or
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1 requests;

2 E. Copies of all sales scripts, training materials, advertisements, or
3 other marketing materials, including but not limited to websites, Internet web-
4 based html "pop up" advertisements and Internet banner advertisements; and all
5 instant messages and e-mail messages related to marketing; and
6

7 F. All records and documents necessary to demonstrate full
8 compliance with each provision of this Order, including but not limited to, copies
9 of acknowledgments of receipt of this Order, required by Paragraphs VIII and IX,
10 and all reports submitted to the FTC pursuant to Paragraph VI of this Order.
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14 **DISTRIBUTION OF ORDER BY DEFENDANTS**

15 **VIII.**

16 **IT IS FURTHER ORDERED** that the defendants shall immediately
17 provide a copy of this Order to current personnel and to each affiliate marketer,
18 sub-affiliate marketer, affiliate, subsidiary, division, sales entity, successor, assign,
19 officer, director, employee, independent contractor, client company, agent,
20 attorney, spouse and representative of the defendants, and shall, within five (5)
21 days from the date of entry of this Order, provide the Commission with a sworn
22 statement that the defendants have complied with this provision of the Order,
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1 which statement shall include the names and physical addresses, and e-mail
2 addresses of each such person or entity who received a copy of the Order.
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5 **Provided further,** that, for a period of five (5) years from the date of entry
6 of this Order, the defendants shall deliver copies of the Order as directed below:
7

8 A. Defendants as Control Persons: For any business the
9 defendants directly or indirectly control, or in which the defendants have a majority
10 ownership interest, the defendants shall deliver a copy of this Order to all
11 principals, officers, directors, and managers of that business. The defendants shall
12 also deliver copies of this Order to all employees, agents, and representatives who
13 engage, if ever, in conduct related to the subject matter of this Order. For new
14 personnel, delivery shall occur prior to the new personnel assuming their
15 responsibilities.
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18 B. Defendants as Employees or Non-Control Persons: For any
19 business where the defendants are not controlling persons of a business but are
20 otherwise directly or indirectly engaged in the business of advertising, marketing or
21 selling goods or services via the Internet, the defendants shall deliver a copy of this
22 Order to all principals and managers of such business.
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25 The defendants must secure a signed and dated statement
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1 acknowledging receipt of the Order within thirty (30) days of delivery, from all
2 persons receiving a copy of the Order pursuant to this Paragraph.
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5 **ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**
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7 **IX.**

8 **IT IS FURTHER ORDERED** that each of the defendants, within five (5)
9 business days of receipt of this Order as entered by the Court, must submit to the
10 Commission a truthful sworn statement acknowledging receipt of this Order.
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RETENTION OF JURISDICTION

X.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

IT IS SO ORDERED,

Dated this 6th day of December, 2005, at 9:30 a.m.

s/Lonny R. Suko

United States District Judge

Stipulated and agreed to by:

Tom Delaney
Thomas L. Delanoy, Defendant

Dated: 10/11/05

Tom Delaney, CEO
MaxTheater, Inc., Defendant

Dated: 10/11/05

J. Michael Keyes
J. Michael Keyes
Attorney for Defendants
Thomas L. Delanoy and MaxTheater, Inc.

Dated: 10-11-05

Mona Sedky Spivack
Mona Sedky Spivack (DC #447968)
Attorney for Plaintiff
Federal Trade Commission

Dated: 10/10/05

CERTIFICATION OF SERVICE

I hereby certify that on the 29th day of November, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

J. Michael Keyes
Theresa L. Keyes
PRESTON GATES & ELLIS LLP
601 West Riverside Avenue, Suite 1400
Spokane, WA 99201-0628

DATED this the 29th day of November, 2005.

By s/ J. Ronald Brooke Jr.
J. Ronald Brooke, Jr., (MD #0202280002)
Mona Sedky Spivack (DC #447968)
Attorneys for Plaintiff
Federal Trade Commission